(b)

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* JOSEPH BENCHIMOL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1165. Decided May 13, 1985

JUSTICE STEVENS, concurring in the judgment.

Whether or not the Government complied with Federal Rule of Criminal Procedure 11(e), I agree that the error, if any, was not serious enough to support a collateral attack under Fed. Rule Crim. Proc. 32(d) or 28 U. S. C. § 2255. The error here is "not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U. S. 424, 428 (1962). Nor has it resulted in "manifest injustice." Fed. Rule Crim. Proc. 32(d). If the Government erred in failing to recommend affirmatively the proper sentence, the time to object was at the sentencing hearing or on direct appeal. "[T]here is no basis here for allowing collateral attack 'to do service for an appeal.'" *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979) (quoting *Sunal* v. *Large*, 332 U. S. 174, 178 (1947)).

Accordingly, I concur in the judgment.